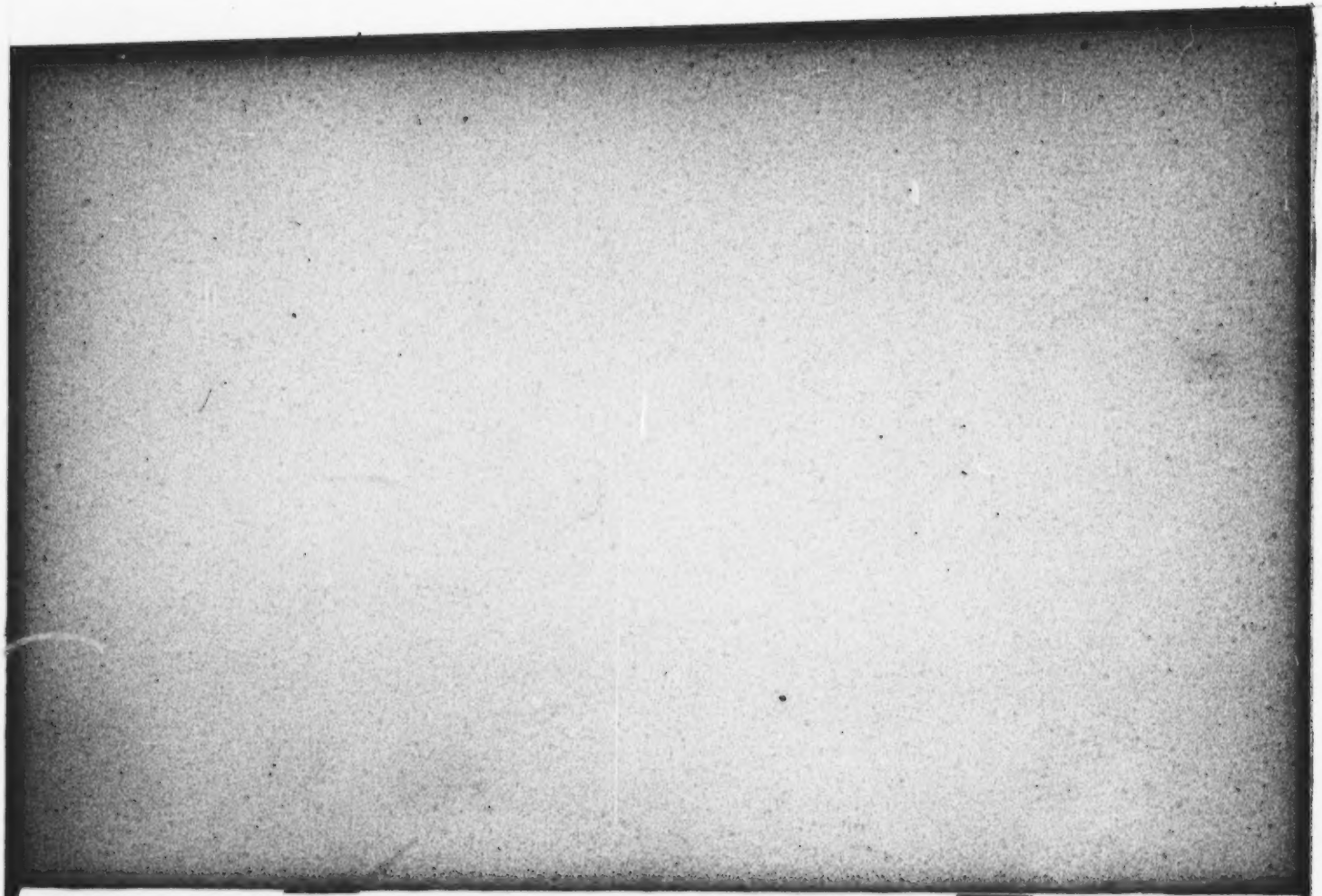

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 1020

Supreme Court, U.S.
FILED
FEB 4 19
MICHAEL RODAK, JR.

JOSEPH DAVIS, 73-1020 Petitioner

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and S.S. EXPORT COMMERCE, her engine, tackle, cargo, gear and apparel,

Respondents,

-and-

TODD SHIPYARDS CORP.,

Third Party Defendants.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S OPPOSING BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 1020

JOSEPH DAVIS,

Petitioner

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
and S.S. EXPORT COMMERCE,
her engine, tackle, cargo, gear and apparel,

Respondents

-and-

TODD SHIPYARDS CORP.

Third Party Defendant

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S OPPOSING BRIEF

STATEMENT

Petitioner is required to reply to respondent's opposing brief by reason of two vital errors affecting petitioner's rights and present application.

First, under POINT NO. I respondent opposes the petition herein upon the fundamental argument that there is no validity to petitioner's suggestion that the result to-date in this case is in conflict with the case of Allen v. Union Barge Line Corp., 239 F. Supp. 1004 (E.D. La. 1965 affirmed 361 F. 2d 217 (5 C.A. 1966) cert. den. 385 U.S. 1006 (1967); and, therefor, that petitioner is not entitled to the protection of the warranty of seaworthiness which the District Court and the 5th Circuit Court of Appeals granted to "Allen" because the facts are not similar.

On page ten (10) of its brief, the first full paragraph thereof, the respondent erroneously states as follows:

> "*****First, we see nothing in the series of Allen opinions from which it could be concluded that the work being performed on the towboat involved the removal of her propeller*****".

Secondly, under Point No. II respondent erroneously states that in rem jurisdiction was not perfected in this case; and, therefor, petitioner cannot recover under the doctrine of res ipsa loquitur, because exclusive control of the vessel by respondent was not established by the petitioner.

POINT I

A CLEAR CONFLICT EXISTS BETWEEN THE CASE AT BAR AND THE HOLDING OF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THE CASE OF ALLEN V. UNION BARGE LINE CORPORATION, SUPRA, CONTRARY TO RESPONDENT'S MISSTATEMENTS.

In its FINDINGS OF FACT — Nos. (1), (4) and (5) the District Court found 239 F. Supp. 1006, as follows:

> "1.***and, removing propeller shafts and installing new sleeves thereon.
>
> 4. Libelant boarded the M/V Mariner on March 23, 1963, as an employee of Dravo. He was to assist in the removal of the propeller shafts by removing the couplings therefrom.
>
> 5. The M/V Mariner is a 192 foot long diesel powered push boat, she has twin screws with two shafts separated by a centerline bulkhead***".

Quite obviously the respondent and no doubt the Court below overlooked or disregarded the aforesaid facts which not merely establish a distinct similarity between the work involved in "Allen", supra, and in this case, but quite obviously, if anything, the "Allen" job required the removal of two propellers and not one, as petitioner Davis was involved with, since the M/V Mariner was a twin screw vessel and Allen was to assist in the removal of both propellers as part of his work, for which the district court and the circuit court of appeals of the 5th circuit provided him with the "Sieracki" protection as a matter of law.

POINT II

THERE WAS IN REM JURISDICTION HEREIN AS REFLECTED BOTH BY THE RECORD ON APPEAL AND BY AFFIDAVIT OF SERVICE BY U.S. MARSHAL ATTACHED HERETO AND MARKED EXHIBIT I

The statements in respondent's brief under Point II concerning in rem jurisdiction are clearly erroneous and do not coincide with the facts, and are in conflict with the record on appeal and the original affidavit of service by U.S. Marshal, on file in the United States Courthouse, upon respondents; which shows in rem jurisdiction perfected September 8, 1971.

Petitioner never waived its right to proceed against the respondents and both the summons (A-8)* and the complaint (A-11)* demonstrate in rem and in personam jurisdiction having been obtained by the filing of a libel; which, furthermore, constituted the basis for the trial of the case in admiralty to the Court.

Indubitably, res ipsa loquitur must apply — contrary to the holdings below, particularly because no proof or evidence was presented at the trial by respondent that it had no control of the vessel deemed to be in navigation; and, especially in view of the fact that respondent was actually engaged in performing and supervising repairs generally aboard the vessel in various and sundry parts thereof as shown by references in petitioner's application.

*Appellant's Appendix on Appeal.

Petitioner's inability to recall any of the circumstances of the accident also raises a presumption of due care on his part; and, no proof or evidence was adduced on the trial by the respondents that the accident and attendant injuries arose as a result of petitioner's activities in prosecuting and performing his work detail aboard ship.[1]

The Court below was in clear error respecting the application of the doctrine of res ipsa loquitur, because of the grossly erroneous conclusion that the vessel was under the exclusive control of TODD SHIPYARDS CORPORATION.

CONCLUSION

The petition should be granted.

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Counsel for petitioner
JOSEPH DAVIS

GEORGE G. KILARJIAN
On the Brief

1. See Slater v. Erie-Lackawanna Railroad Company, 411 F. 2d 1015 (1969).

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DEFENDANT: AMER. EXPT. ISBRANDTSEN LINES + SS EXPORT COMMERCE — TYPE OF WRIT: SUM + COMP

SERVE — NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN: AMERICAN EXPORT ISBRANDTSEN LINES

AT — ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code): 26 BROADWAY, N.Y.C., N.Y.

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

JACOB KASSNER
15 PARK ROW
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REMARKS:

USM-285 (Rev. 12-15-70) — 5. NOTICE OF SERVICE